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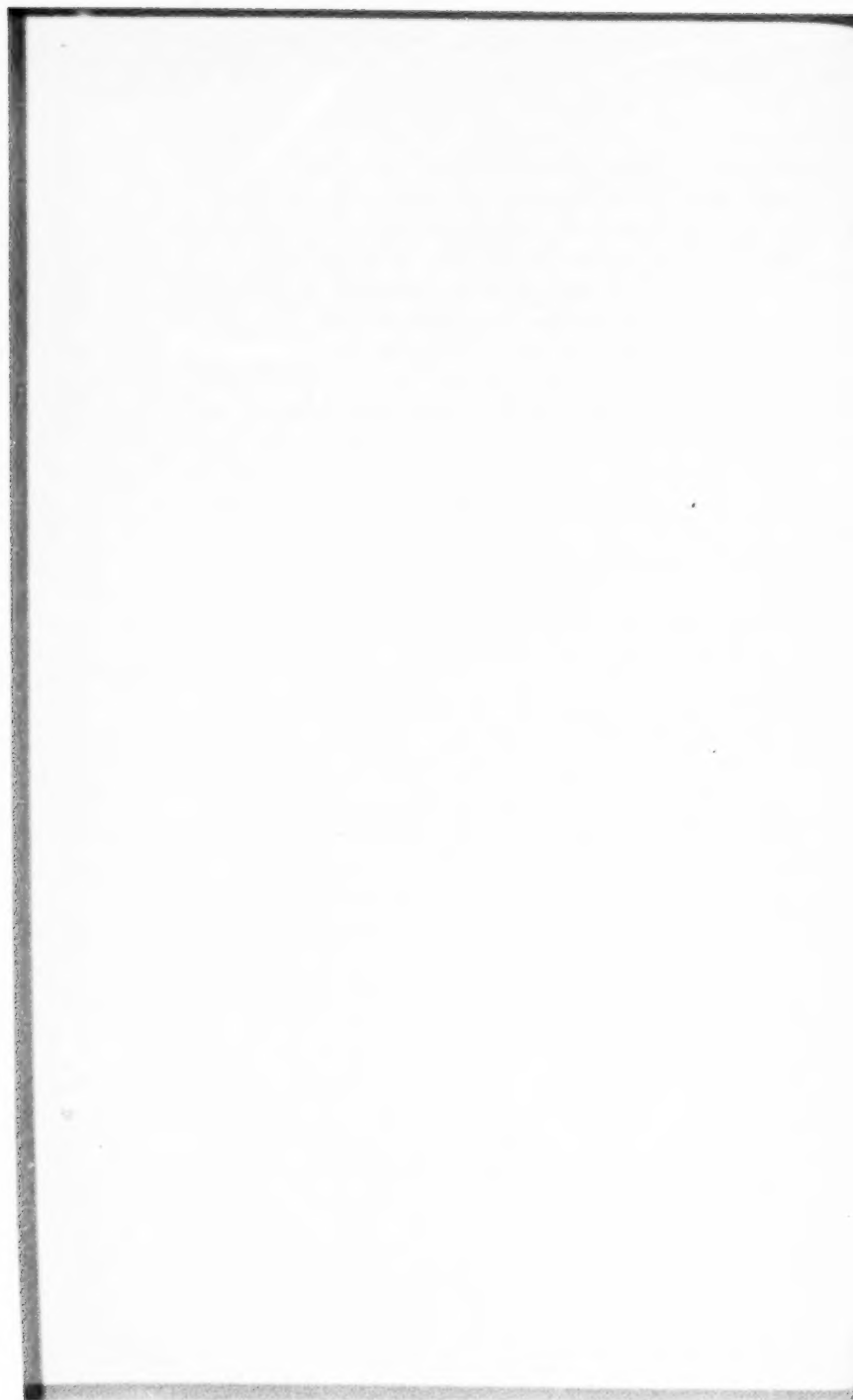
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United States Supreme Court.

In the Matter

of

The Petition of AMERICAN RAILWAY EXPRESS
COMPANY,

Petitioner,

—against—

THE COMMONWEALTH OF KENTUCKY,

Respondent,

For a Writ of Certiorari to the Court of Appeals
of the State of Kentucky to bring before the
Supreme Court the case of COMMONWEALTH
OF KENTUCKY,

Plaintiff-Respondent,

—against—

AMERICAN RAILWAY EXPRESS COMPANY,

Defendant-Appellant.

Notice of Presentation.

Sir:

PLEASE TAKE NOTICE that upon a certified copy of the transcript of record herein and upon the annexed petition of American Railway Express Company, verified the 25th day of January, 1924, I shall submit the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on the 18th day of February, 1924, at

the opening of court on that day or as soon thereafter as counsel can be heard; and that I shall then and there move for such further relief in the premises as may be just.

Dated, New York, January 25th, 1924.

Yours, &c.,

CHARLES W. STOCKTON,

Attorney for Petitioner,

Office & P. O. Address,

2 Rector Street,

Borough of Manhattan,

City of New York.

To:

THOMAS B. MCGREGOR, Esq.,

Attorney for Respondent,

Frankfort, Ky.

Petition.**UNITED STATES SUPREME COURT.**

In the Matter
of

The Petition of AMERICAN RAILWAY EXPRESS
COMPANY,
Petitioner,
—against—

THE COMMONWEALTH OF KENTUCKY,
Respondent,

For a Writ of Certiorari to the Court of Appeals
of the State of Kentucky to bring before the
Supreme Court the case of COMMONWEALTH
OF KENTUCKY,
Plaintiff-Respondent,
—against—

AMERICAN RAILWAY EXPRESS COMPANY,
Defendant-Appellant.

*To the Honorable Chief Justice and Associate
Justices of the Supreme Court of the United
States:*

Your petitioner respectfully shows as follows:

I. This is a petition for a writ of certiorari to review a judgment of the Court of Appeals of Kentucky, holding the petitioner, American Railway Express Company, liable for a judgment rendered against the Adams Express Company in a prosecution against the Adams Express Company, to which the American Railway Express

Company was not a party, to recover fines for alleged violations of a penal statute of the State of Kentucky. Said decision was based upon the fact that while said prosecutions were pending, the petitioner purchased from the Adams Express Company all of its property located in the State of Kentucky, issuing its stock in payment therefor.

II. Your petitioner is a corporation, organized in June, 1918, under the laws of the State of Delaware, pursuant to a contract theretofore entered into between the Government of the United States and the Adams Express Company, American Express Company, Southern Express Company and Wells Fargo & Company, dated June 21, 1918 (Record, p. 87).

III. The said Adams Express Company is a joint stock association organized under the common law of the State of New York, the members of which are unlimitedly liable for all the obligations and liabilities of said association (Record, p. 116).

IV. This action was brought to recover from the petitioner the amount of two judgments rendered against the said Adams Express Company. Said judgments were rendered in January, 1921, in prosecutions begun prior to June 30, 1918, by the Commonwealth of Kentucky against the Adams Express Company to recover fines for alleged violations of a penal statute of the State of Kentucky known as section 2569B of the Kentucky statutes (Record, p. 2).

V. This is the second case of this nature to come before this court and the Court of Appeals of Kentucky. The first case, involving the same parties and the same issues, was affirmed by the Court of Appeals of Kentucky in a lengthy opinion *American Railway Express v. Commonwealth*, 228 S. W. 433, which is set out in full in the Appendix, annexed to this application. That case was brought up to this court on a writ of error, but the appeal was dismissed October 8, 1923, on a *per curiam* memorandum, *American Railway Express Company v. Commonwealth of Kentucky*, United States Supreme Court, October Term, Advance Opinion 13:

“October 8, 1923. *Per Curiam*: Dismissed for want of jurisdiction upon the authority of Section 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. Section 1214 Fed. Stat. Anno. Supp. 1918, p. 411), Section 2; *Jett Bros. Distilling Co. v. Carrollton*, 252 U. S. 1, 5, 6, 64 L. ed. 421, 424, 40 Sup. Ct. Rep. 255.”

VI. The complaint in the present action alleges the recovery of said judgments against said Adams Express Company and return of execution thereon unsatisfied and that the petitioner on June 30, 1918, acquired all the assets of said Adams Express Company in exchange for the issuance of capital stock of the petitioner and assumed all the liabilities of said Adams Express Company (Record, pp. 3, 4). The petitioner's answer denies that it acquired all the assets of said Adams Express Company and denies that it ever assumed any of the obligations of said Adams Express Company and sets forth several affirma

tive defenses, in one of which it alleges that the judgment asked for would deprive the petitioner of its property without due process of law and deny to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States (Record, p. 15).

VII. The present case came on for trial after the decision of the Court of Appeals of Kentucky in the prior case, and while the appeal in said prior case was pending in this court. Upon the trial the petitioner moved to dismiss the complaint on the ground that it sought to deprive the petitioner of its property without due process of law, and that to so take the property of the petitioner would deny it the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States (Record, pp. 27, 28). However, said motions were denied and judgment was rendered in favor of the Commonwealth of Kentucky against the petitioner for the full amount of the said two original judgments against the Adams Express Company, over the objection and exception of the petitioner (Record, p. 29).

VIII. Thereafter petitioner appealed from the said judgment of the Circuit Court of Harlan County to the Court of Appeals of Kentucky. Said appeal came on for a hearing after the dismissal by this Court of the writ of error in the prior case. On October 30, 1923, the Kentucky Court of Appeals affirmed the judgment of the lower court without opinion. Said Court of Appeals is the highest court of the State of Kentucky and is the highest court of the State of

Kentucky in which a decision in this suit can be had.

IX. Your petitioner was organized under the following conditions: Prior to June 30, 1918, the Adams Express Company, American Express Company, Southern Express Company and Wells Fargo & Company were all engaged in the express transportation business in the United States. Said express companies were competitors and one or more of them operated in practically every State in the United States. Said express business required for its operations contracts with various railroad lines by which said railroad lines transported on passenger train schedule the shipments entrusted to said express companies for transportation, and also required said express companies to have offices located in every city in the United States, at which it was necessary to have horses, trucks and other equipment used in the express transportation business (Record, p. 71).

On December 28, 1917, the President of the United States acting under the war powers vested in him by Congress, took over practically all the railroad lines in the United States, vesting the possession and full control thereof in his agent W. G. McAdoo, Director General of Railroads.

Said W. G. McAdoo, as Director General of Railroads refused to continue the performance of the contracts between the various express companies above named and the companies owning the railroad lines under his control and refused to make any new agreements for railroad transportation service with the said express companies severally. However, he offered to deal with a

single corporation if the said express companies would transfer to it their operating equipment and personnel, used in the operation of a domestic express business (Record, p. 71).

Accordingly, on June 21, 1918, a contract was entered into between said W. G. McAdoo on behalf of the United States, and said Adams, American, Southern and Wells Fargo express companies, providing for the organization of the petitioner, American Railway Express Company (Record, p. 87), to carry on for the Director General, beginning July 1, 1918, the express transportation business upon the railroads and systems of transportation under Federal Control. Said agreement provided for a maximum issue of capital stock of the par value of \$40,000,000. Said stock was to be issued at par in exchange for the domestic express operating equipment of the said express companies at its fair market value. No stock was to be issued for good will, contract rights, franchises or other intangible property. The said express companies were each to retain their individual existence and also their cash and treasury assets.

Pursuant to this agreement the Adams Express Company transferred to the petitioner on June 30, 1918, express operating equipment of the value of \$8,600,000, and approximately \$900,000 in cash for which stock of the petitioner was issued at par. At the same time the said other express companies transferred to the petitioner property and cash of the fair value of approximately \$25,000,000, for which stock was issued to them at par. The petitioner is informed and believes that all the property belonging to the Adams Express Company in the State of Kentucky, of the ap-

proximate value of \$93,000, was included in this transfer (Record, p. 78), but the Adams Express Company retained property in other States of the value of over \$54,000,000.

X. Petitioner has never, either in writing or orally, assumed any of the obligations or liabilities of the said Adams Express Company and has never assumed the performance of any of its contracts or paid from its own funds any of the obligations or liabilities of the Adams Express Company (Record, p. 35).

XI. There has been no legal or practical merger or consolidation of the said Adams Express Company into your petitioner. The affairs of the petitioner are managed and controlled by a Board of 12 directors of whom only four are in any way connected with the Adams Express Company. None of the officers or employees of the petitioner are officers or employees of or in any way connected with the Adams Express Company (Record, p. 35). Less than one-third of the capital stock of the petitioner is owned by the said Adams Express Company.

Petitioner is informed and believes that on June 30, 1918, in addition to its domestic express transportation business, the said Adams Express Company was engaged in the business of a foreign freight forwarder, the remittance of foreign exchange to consignees abroad and the issuance and sale of traveller's cheques and money orders (Record, p. 71); that it also owned, directly or through subsidiary corporations, a large amount of real and personal property which was not directly connected with the express business and which was never transferred to petitioner; and

that at that time the estimated value of the total gross assets of the Adams Express Company was approximately \$63,000,000, of which the value of the equipment used in the operation of an express business and transferred to the petitioner was only \$8,600,000 (Record, p. 74). Since July 30, 1918, the said Adams Express Company has maintained offices in the City of New York, State of New York, at which its executive offices are located (Record, p. 35); it has a bond issue outstanding which does not mature until 1948 (Record, p. 50); it has not distributed the stock received from the petitioner or any other capital assets to its stockholders (Record, p. 75) and has taken no steps looking toward a dissolution (Record, p. 43); in March, 1922, it resumed business in New York in the transportation of money and securities in armored cars (Record, p. 75). At all times since June 30, 1918, the said Adams Express Company has been solvent and has paid claims amounting to several millions of dollars, which have been handled from the New York office of said Adams Express Company (Record, p. 76).

XII. The questions of constitutional law involved on this application are:

(1) Whether it is a lack of due process of law for the Kentucky Court to deprive the petitioner of its property on the following assumptions which are unsupported by the record and contrary to fact; (a) that the Adams Express Company is a corporation; (b) that the State of Kentucky was a creditor of the Adams Express Company on June 30, 1918; (c) that the stock issued to the Adams Express

Company was distributed by it among its shareholders.

(2) Whether petitioner is denied the equal protection of the laws by a decision of a state court which holds that a corporation which pays cash for property is a holder for value but that a corporation which issues less than a controlling interest of its own stock for property is a donee, and takes such property subject to existing claims of the vendor's creditors.

(3) Whether it is lack of due process for the state of Kentucky to enforce a rule that a *bona fide* purchaser for value of all the Kentucky property of a solvent vendor is liable to Kentucky creditors of the vendor to the extent of the value of the property acquired.

(4) Whether a decision of a state court which is contrary to the common law, and justifiable only as an exercise of the state's police power, can be retroactively applied to affect vested rights.

Your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons, among others:

(a) The decision of the state court denying the asserted Federal right and depriving the petitioner of its property is without support in the record and is contrary to undisputed testimony in the record.

(b) The decision of the state court denies to petitioner the equal protection of the laws insofar as it distinguishes between a *bona fide* issue of a minority stock interest and a cash payment.

(c) The decision of the state court deprives the petitioner of its property without due process of law because it places harsh and unreasonable restrictions upon freedom of contract and the acquisition and alienation of property.

(d) The decision of the state court deprives the petitioner of its property without due process of law because, as a rule of law justifiable only under the state's police power, it retroactively affects rights which vested before the adoption of the rule.

(e) The case is of great importance to petitioner because of the possibility of it being held liable in other states for obligations or liabilities of the Adams Express Company, American Express Company, Southern Express Company or Wells Fargo & Company.

(f) The case is of great public importance because there have been conflicting decisions by the courts of various states and because of the novelty of the rule adopted by the state court and the far reaching effect which its adoption will have on commercial and corporation law.

WHEREFORE, your petitioner prays that this court will be pleased to grant a writ of certiorari in this case to the Court of Appeals of the State of Kentucky, to bring up this case to this Honorable Court, and for such proceedings therein as to this Honorable Court may seem just.

AMERICAN RAILWAY EXPRESS COMPANY,

By CHARLES W. STOCKTON,

Attorney for Petitioner,

2 Rector Street,

New York.

State of New York,
County of New York,
Southern District of New York—ss.:

FREDERICK P. SMALL, being duly sworn says, he is the Secretary of American Railway Express Company, the petitioner herein; that he has read the foregoing petition and knows its contents; that the same is true to the best of his knowledge and belief; that his knowledge and belief are based upon the record in the case, his general knowledge of the affairs of the company and statements made to him by counsel in the case.

FREDERICK P. SMALL.

Sworn to before me this
25th day of January, 1924.

A. P. Roos,
Notary Public.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

CHARLES W. STOCKTON,
Attorney for Petitioner.